**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 22**

IMAGEFIRST

Case 22-CA-161563
And 22-CA-181197

LAUNDRY DISTRIBUTION AND FOOD SERVICE JOINT BOARD, WORKERS UNITED, A/W SERVICE EMPLOYEES INTERNATIONAL UNION

# COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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## I. SUMMARY OF THE ARGUMENT

The record evidence adduced at the hearing before Administrative Law Judge Arthur Amchan ("ALJ") clearly supports his findings that ImageFirst ("Respondent") violated Section 8(a)(1) and (3) of the Act by discharging unpopular supervisor Joseph Ventura ("Ventura") and unpopular lead person Miriam Farez ("Farez"), soliciting and impliedly promising to remedy grievances in a manner different than it did before a Union organizing campaign began, increasing the frequency and quality of food provided to employees in order to discourage employees from supporting Laundry Distribution and Food Service Joint Board, Workers United ("Union"), and maintaining an unlawful rule prohibiting employees from discussing payroll information. *ALJD 11:13-27.*

In regard to the terminations of Ventura and Farez, the ALJ appropriately rejected Respondent's contention that terminating unpopular supervisors is only unlawful if done after an organizing petition is filed. The ALJ correctly noted that the Board has never stated that it will only find the termination of an unpopular supervisor unlawful if made during the critical period between the filing of a petition and a representation election while finding that the Ventura and Farez terminations were motivated by Respondent's desire to grant employees a benefit in order to discourage union activity in violation of Section 8(a)(1) of the Act. *ALJD 6:1, 11-12, 35-38.*

The ALJ also properly found that Respondent solicited grievances and impliedly promised to remedy those grievances in a manner different than it did prior to the start of the Union organizing campaign. *ALJD 11:18-19.* The ALJ reached his finding because the record evidence established that after commencement of the Union campaign, Respondent solicited employee grievances in a different manner than it had beforehand. *ALJD 10:29-30, 11:1-4.* In that regard, the ALJ noted that Respondent failed to call any employee witnesses to produce any

other evidence to corroborate its management officials' assertions that Respondent's pre-campaign practices with regard to solicitation and remedying grievances did not significantly change after the start of the union campaign. *ALJD 10:6-16.*

The record evidence also supports the ALJ's conclusion that Respondent's change in the "quality and frequency of the food [it] provided to employees after the organizing campaign started… [was] significant enough to constitute an illegal benefit motived by a desire to discourage employees from supporting the Union". *ALJD 9:10-13.* In this regard, the ALJ correctly relied on documents authored by Respondent to find that its "Lunch with the Boss" program was revived after the Union organizing campaign began and that, for the first time, employees were taken out to eat and/or given the choice of ordering whatever they wanted for lunch in the facility. *ALJD p. 8:47-9:8.*

The record evidence also supports the ALJ's conclusion that Respondent unlawfully maintained a rule prohibiting employees from discussing wages regardless of why the rule was promulgated or whether it was ever enforced or promulgated. *ALJD 3:16-18.* Employee testimony adduced during the hearing clearly established that Respondent promulgated the unlawful rule when its managers and/or supervisors instructed employees not to discuss their wages with other employees. *Tr. 167, 198, 223, 249, 287, 291, 298, 308, 344, 357, 358.*

## II. STATEMENT OF FACTS[1]

### A. Overview.

In July 2015, the Union embarked on a campaign to organize Respondent's employees. *Tr. 17, 382*. On July 12, 2015, Respondent first became aware of the Union campaign. *Tr. 445-446.* On July 13, 2015 Respondent's Vice-President James Kennedy ("Kennedy") held two large meetings of all employees to discuss the Union campaign. *Tr. 59, 445-446.* On July 14, 2015 Respondent's owner Jeffrey Berstein ("Berstein") held a series of small meetings with employees and solicited grievances. *Tr. 676* That same day Berstein ordered the termination of supervisor Ventura and lead employee Farez. *Tr. 543, 546-547; GC 2, 11(b).* On July 20, Kennedy held another large meeting with employees, announced that both Ventura and Farez had been terminated, and apologized that they had not been terminated sooner. *Res. 12*. Thereafter, Kennedy and Berstein held many with employees meetings to discuss Unions, the Union campaign and to solicit employees' grievances. *Tr.533-651, 676-702,* After the Union organizing campaign began Respondent also revived its "lunch with the boss" program, increased the frequency that it provided food to its employees, took some employees off site for lunch and instructed other employees to order food from menus. Finally, when Respondent informed individual employees of increases in their wages, Respondent told them not to talk with their coworkers about the raises that they had received. *Tr. 251-253, 533-534, 651, 271*.

[1] The statement of facts and the argument relies upon the Transcript of the hearing before Administrative Law Judge ("ALJ") Arthur Amchan, the exhibits introduced at this hearing, and the ALJ's decision. The Transcript is referred to as "*Tr.*" and "*XX:XX*", indicating the page and line number referenced. General Counsel and Respondents Exhibits are referred to, respectively, as "*GC Exh.*" and "*R Exh.*" followed by the exhibit number. The ALJ's decision is referred to as "*ALJD*" and "*XX:XX*" indicating the page and line number referenced.

**B. Facts relating to the termination of unpopular Supervisor Joseph Ventura and unpopular Lead employee Miriam Farez.**

Well before the Union organizing campaign began Respondent knew employees were unhappy about the way both Ventura and Farez were treating them. *Tr. 97, 98, 99, 113, 114, 157, 158, 160, 186, 187, 248, 249; GC Exh. 9, 10*. Ventura, who was hired on February 2, 2015 was the subject of numerous employee complaints. *Id*. Employees complained about Ventura to Respondent's manager Luis Betancourt ("Betancourt") and to Human Resources Business Partner Caitlin Payne ("Payne"), with Payne documenting the employees' concerns after meetings with them on May 27, 2015 and July 9, 2015. *GC 9, 10*. Both Betancourt and Payne reported the employee's complaints to Vice-President Kennedy, the highest-ranking manager in Respondent's Clifton, New Jersey facility. Payne's reports were also read by owner. Berstein. *Tr. 675-677, 681, 704-705.* After learning of the employees' complaints neither Kennedy nor Berstein disciplined Ventura or Farez, instead, dismissing the complaints as insignificant. *Tr. 540, 542, 623-629, 709.*

On May 27, 2015 Respondent's HR business partner Caitlin Payne ("Payne") met with employees. *GC Exh. 9.* Employees told Payne that Farez was creating a negative environment because she is rude to employees and does not care about them or show any compassion. *GC Exh. 9.* Employees also complained that Ventura "has yelled at them". Payne memorialized the employees' grievances, writing that employees said that they went to Betancourt with their complaints but that nothing had changed. *GC Exh. 9.*

On July 9, 2015 Payne again met with employees at Respondent's Clifton facility. In her memorandum of this meeting Payne wrote that she "brought up Leads again at this meeting and they did not say anything about Miriam [Farez] this time." *GC 10*. In regard to Ventura, Payne wrote that "there was a big focus on Joe's supervisory approach at all of my meetings". Payne

penned that employees "believe he cares about them and the work but his approach [is] too aggressive". *GC 10.*

Kennedy testified that beginning in about the first quarter of 2015 he knew that employees were complaining about Farez and Ventura. *Tr. 540, 623.* Kennedy and Betancourt personally met with Ventura and Farez in about April or May to discuss employee complaints but neither were disciplined pursuant to Respondent's progressive discipline policy. *Tr. 540, 542, 623-626, 629; GC Exh. 4:6-7.*

Corporate Director of Human Resources Jamee Rivers ("Rivers") was also familiar with employee complaints regarding Ventura and Farez. *Tr. 489-491.* Rivers testified that even though she was aware of Ventura's and Farez's value breaches, and that she would get normally get involved in those types of situations, no action was taken in response to the employees' complaints. *Tr. 491-492, 499-500.*

Respondent's owner Berstein was also aware of employees' complaints regarding Ventura and Farez well before the Union began its organizing campaign. Berstein had heard about employee complaints regarding Farez and Ventura "over the course of [his] previous visits to the facility" but did not order any discipline pursuant to Respondent's progressive discipline policy. *Tr. 675-677, 681, 704-705; GC 4:6-7.* Berstein only ordered Farez's and Ventura's termination after hearing employees again complain about both during his visits with employees two days after Respondent discovered the Union was organizing its employees. *Tr. 59-60, 111, 293, 538, 677, 681-682.*

### C. Facts relating to Respondent's practice of soliciting and remedying employee grievances.

Immediately after discovering that the Union was trying to organize its workforce Kennedy met with employees on July 13, 2015 and on July 15, 2015. *Tr. 533-534, 651.* During these meetings Kennedy told the employees that "other problems that we had, the company was going to resolve them, but not the union" and that Respondent was "going to give us better conditions to work, better work conditions". *Tr. 135-136, 149-150, 184.*

On July 14, 2015, Respondent's owner Berstein met with employees in about five or six small groups to discuss the Union organizing campaign and the employees' working conditions. *Tr. 59-60, 111, 293, 538, 677.* At these meetings Berstein told employees that "every problem that we had the company would resolve, but not the Union", that he was going to try to "make better work and give us better conditions", and that he would consider the employees' issues while promising to change everything so that they would be ok. *Tr. 112-113, 152, 154-157, 192.*

On July 20, 2015 Kennedy conducted two large group meetings with employees. *Tr. 548.* Kennedy testified that during these meetings he informed employees that Respondent had terminated Ventura and Farez in response to employees' complaints and apologized for not doing so sooner. *Tr. 466, 548-549, 652; GC 13(a); Res 12.*

After the July 13, 14, 15 and 20, 2015 meetings, and until about November 30, 2015, Respondent held more meetings where both Berstein and Kennedy discussed the Union with employees. *Tr. 160, 271, 287-289.* At these meetings Berstein asked employees "if there's anything that he can do to make their jobs easier" and "what he could do to make their jobs better". *Tr. 287, 291.*

Both Berstein and Kennedy testified that before the Union campaign began they met with employees and conducted meetings in the same way they had after the Union campaign started.

*Tr. 614-617, 560, 670-673, 721-723.* However, the evidentiary record shows that before the Union campaign began neither Respondent's "be our best meetings" and "lunch with the boss" meetings were not occurring between April and July, 2015 and that Kennedy or Berstein only began directly solicit employee grievances after the Union showed up. *GC 9 and 10.*

**D. Facts Relating to Respondent's rule prohibiting employees' from discussing payroll information.**

It is undisputed that Respondent' Handbook is distributed at its California, Florida, Georgia, Illinois, New Jersey, New York, North Carolina and Pennsylvania facilities and that it contains a rule stating:

> Certain serious offenses can result in immediate suspension or termination:
> These include, but are not limited to:
>
> I. Discussion of payroll information. *GC 4, pg. IF 13.*

Even though the record contains no evidence that the handbook was distributed to employees there is ample record evidence showing that, both before the Union campaign began and afterwards, Respondent enforced its handbook rule by verbally informing employees that they should not discuss their wages with their co-workers. When employee Gonzales was hired in 2014 manager Betancourt told her that she "shouldn't tell the other employees of how much [she] was earning or if she [received] a raise. *Tr. 197-198, 223-224.* After the Union campaign began, during a round of salary increases in January, 2016, Respondent's managers and supervisors individually informed employees that they were receiving wage increases and instructed them "not to tell anybody anything", "not to tell the other employees", "not to tell anyone" and to "keep it a secret". *Tr. 167, 175, 249, 297-298, 308, 344.*

**E. Facts relating to Respondent's post union organizing campaign practice of providing food to employees.**

After the Union campaign commenced Respondent increased the frequency and quality of the food it provided to employees and, for the first time, took employees out to lunch. When Respondent found that taking employees out to eat impacted productivity, again for the first time, Respondent provided employees with menus so that they could order whatever food they wanted to eat inside its facility. *Tr. 100, 115, 116, 117-118, 128, 129, 131, 165, 162, 179-181, 196-197, 205, 207-208, 241, 243, 244, 269-270, 594-601; GC 9, 10.*.

Before the Union campaign began Respondent provided employees with meals only on holidays and, sporadically, "cake and soda" on birthdays and anniversaries. *Tr. 100, 115, 128-129, 162-165, 179-181.* After the Union showed up, however, Respondent provided the employees with breakfast two or three times a week and ethnic food for lunch just as often, *Tr. 162-165, 179-181, 205, 207-208.*

After the Union campaign began Respondent's manager Caesar Sanchez, for the first time, took small groups of employees out of the facility to restaurants. *Tr. 117-118, 179-180, 505-507*. When that practice proved too disruptive to its business Respondent, again for the first time, provided employees with menus and instructed them to "order anything" they wanted to eat in the facility. *Tr. 116-117, 165, 206.* Employee witnesses universally declared that before the Union showed up Respondent never showed them a menu, never instructed them to order whatever they liked and never took anybody out to eat lunch. *Tr. 165-166, 244, 295, 297, 606-607, 657.*

## III. ARGUMENT

### A. The record evidence supports ALJ Amchan's finding that Respondent violated Section 8(a)(1) of the Act when it terminated unpopular Supervisor Joseph Ventura and unpopular Lead employee Miriam Farez in order to discourage employees from supporting the Union. (Respondent's exceptions 1, 7, 8, and 9).

ALJ Amchan's conclusion that Respondent terminated both supervisor Ventura and lead person Farez days after learning of the Union's organizing campaign in order to discourage employees support for the Union is fully supported by the documentary and evidentiary record. First, in reaching his finding, the ALJ dismissed Respondent's contention that it did not know the extent of employee's dissatisfaction with Ventura and Farez until Berstein met with employees three days after Respondent discovered the Union's organizing campaign. *ALJD 5:13–36.* In that regard, the ALJ's finding that "Employee complaints about Farez and Ventura were not new" is fully supported by the documentary evidence. *ALJD 5:13; GC Exh. 9, 10.* Next, the ALJ properly relied on the Board's decision in *Burlington Times* in rejecting Respondent's suggestion that a decision to terminate an unpopular supervisor is only unlawful if made after a representation petition is filed. *ALJD 6:11-13. Burlington Times,* 328 NLRB 750 (1999). Finally, the ALJ appropriately discarded Respondent's argument that finding the termination of Ventura and Farez unlawful would proscribe it from terminating any supervisor during an organizing campaign because here "the terminations of Farez and Ventura were not based on any conduct occurring after Respondent became aware of the organizing campaign. *ALJD 27-28.*

The ALJ gave short shrift to Respondent's argument that Berstein and Kennedy did not know the full extent of Ventura's and Farez's conduct towards employees before Berstein met with employees days after learning the Union was organizing employees. *ALJD 5:14-17; 6:27-30.* The employee testimony adduced during the hearing fully supports the ALJ's conclusion that well before the Union arrived on the scene employees had complained to both Berstein and

Kennedy about the way Ventura and Farez were treating employees. *ALJD 5:19–35; Tr. 97-99, 113-114, 157-158, 160, 186-187, 248-249, 623-624, 629-631, 676-677; GC Exh. 9 and 10.* The record evidence clearly establishes that employees' complained about both Ventura and Farez to Respondent's human resources representative Caitlin Payne on May 27, 2015 and about Ventura on July 9, 2015, and that Payne verbally reported those complaints to Kennedy and that Berstein reviewed Payne's documents. *Tr. 623-624, 629-631, 676-677.*

The ALJ's findings that Respondent was aware of employee complaints about Ventura and Farez are supported by Kennedy's testimony where he declared that months before the Union campaign he knew employees had complained about both Farez and Ventura but that he dismissed those complaints as "random here and there comments". *Tr. 540, 623-626.* In the same regard, Berstein testified that he reviewed the memorandum created by Payne and had heard employees complain about Farez "over the course of [his] previous visits to the facility " but did not explain why those earlier complaints did not lead to discipline. *Tr. 675-677, 681, 704-705.*

The ALJ properly addressed and dismissed Respondent's contention that the termination of unpopular supervisors must occur during the critical period after a representation petition filing in order to be found unlawful. *ALJD 6:4-20.* Contrary to Respondent's argument, the cases cited by Respondent do not state that a temporal nexus linking employer knowledge of a union organizing campaign to the termination of an unpopular supervisor can only be established when the union has filed a petition. *Woodbury Partners, LLC,* 353 NLRB 1071, 1071 (2009) ("We agree with the judge that the timing of Arvelo's discharge creates an inference that it was intended to interfere with or coerce employees in their choice of representatives"); *Burlington Times, Inc.,* 328 NLRB 750, 750 (1999) ("We particularly emphasize the timing and unprecedented nature of the Respondent's conduct"); *Eagle Material Handling of NJ,* 224 NLRB

1529, 1529 (1976) ("the Union obtained signed authorization cards from a majority of Respondent's employees on January 11, 1974, and that subsequently the Union's majority status was dissipated by Respondents' unfair labor practices which began on January 20"); *Ann Lee Sportswear,* 220 NLRB 982, 982 (1975) (almost immediately after receiving the Union's demand for recognition … Respondent began a campaign to interfere with and coerce the employees regarding their desire for a union"… by forcing the immediate resignation of Supervisor Keifer concerning whom the employees had expressed dissatisfaction").

Here, it is uncontested that Respondent terminated Ventura and Farez almost immediately after finding out about the Union organizing campaign. *Tr. 445-446, 543, 546-547; GC Exh. 2, 11(b)* (Respondent first learned of the Union organizing campaign on July 12, 2015 and terminated Farez and Ventura on July 15, 2015 and July 20, 2015, respectively). Similar to the facts in *Ann Lee Sportswear*, here, Respondent terminated Ventura and Farez almost immediately after learning of its employees' union activity. The ALJ, citing to the Board's holding in *Burlington Times,* properly concluded that the Board has never announced a bright-line rule holding that termination of unpopular supervisors can only be found unlawful if made during the critical period and should not create such a safe harbor now. *ALJD 6:11-12.*

Finally, the ALJ dismissed Respondent's contention that a finding that it acted unlawfully here would lead to the conclusion that it is not permitted to terminate any supervisor during an organizing campaign. *ALJD 6:22-24.* The ALJ properly dismissed Respondent's contention because the record is clear that "the terminations of Farez and Ventura were not based on any conduct occurring after Respondent became aware of the organizing campaign". *ALJD 6:27-28.* Rather, as the ALJ correctly noted, the employee grievances which spurred Respondent to discharge Ventura and Farez predated the organizing campaign. This, as the ALJ explained,

indicates that Respondent's post-campaign discharges of these individuals was motivated by an unlawful decision to interfere with its employees union activities. *ALJD 6:22-29.*

The Board should affirm the ALJ's finding that Respondent unlawfully terminated Ventura and Farez as Respondent knew employees were complaining about them for months before employees' union activity came to light and terminated them almost immediately after learning of the Union organizing campaign. Moreover, the Board should affirm the ALJ's finding because Respondent did not terminate Ventura and Farez because of conduct after it became aware of the organizing campaign began but because it was motivated by its desire to "restrain, coerce and/or interfere with union activity in violation of Section 8(a)(1) of the Act. *ALJD 6:36-38.*

**B. The record evidence supports ALJ Amchan's finding and credibility determinations that Respondent, by owner Jeffrey Berstein and Vice-President James Kennedy, Violated Section 8(a)(1) of the Act by soliciting and remedying employee grievances in a manner different than it did prior to the start of the Union organizing campaign. (Respondent exceptions 2, 6, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23).**

The ALJ's finding that Respondent solicited grievances from employees and impliedly promised to remedy them in a manner materially different from the way it solicited and remedied grievances before the Union campaign began is firmly grounded in documentary evidence adduced during the hearing, is fully supported by Board precedent, and should be sustained. *ALJD 9:36-37, 10:21-23, 10:32-35, 11:6-9; GC Exh. 9, 10; R. Exh. 11, 13; House of Raeford Farms,* 308 NLRB 568, 569 (1992) (While an employer that has had a past practice and policy of soliciting grievances may continue to do so during an organizational campaign, an employer cannot rely on past practice if it "significantly alters its past manner and methods of solicitation during the union campaign."), see also *Jefferson Nat'l Bank*, 240 NLRB 1057, 1067 (1979).

In terms of credibility, the basis for the ALJ's determination discrediting Respondent's witnesses offers further support for his conclusion that Respondent materially altered its past practice of soliciting employees grievances in the days and weeks after learning of the Union's organizing campaign in violation of Section 8(a)(1) of the Act. *ALJD 10:6-30.* The Board should sustain the ALJ's credibility findings because he reasonably relied on documents introduced during the hearing, or the lack of corroborative evidence, and on the credited testimony of employees Claudia Ulloa and Exana Estelus to reach his decision to discredit owner Berstein's and Vice-President Kennedy's testimony that they did not alter their pre-union practice of soliciting and remedying employee grievances after the Union organizing campaign began. *ALJD 10:29-30, fn 7; GC Exh. 9, 10; R Exh. 11.*

Contrary to Respondent's contentions, the documentary evidence adduced at trial belies Respondent's position. It is uncontested that before the Union organizing campaign began Respondent sent human resources employee Catlin Payne to its facility to meet with employees and solicit grievances. *GC Exh.9, 10.* It is also uncontested that Respondent's owner Berstein visited with employees before the Union campaign began merely "to hear what they have to say and also to be able to get the company message out to them". *Tr. 723.* There is, however, no record evidence showing that Respondent ever acted on any complaints made to Payne or Berstein by employees before the Union arrived on the scene. In that regard, it is uncontested that before the Union campaign began Berstein had "heard about complaints about Miriam [Farez] over the course of the previous couple visits". *Tr. 676.* Again, however, the record is devoid of any evidence that Berstein did anything about Farez before deciding to terminate her three days after hearing that the Union was organizing Respondent's employees. The ALJ, therefore, is justified in concluding that Berstein used his July 14 meeting with employees to

solicit and remedy complaints about two unpopular supervisors in a manner starkly different from Respondent's previous practice. *ALJD 9:30-34.*

In regard to meetings conducted by Kennedy, the ALJ relied on Kennedy's own testimony and Respondent's exhibits to conclude that he solicited employee grievances in a manner different from before the Union campaign began. *ALJD 9:47-10:1; Tr. 578; R Exh. 14.* The record evidence supports the ALJ's finding that Kennedy not only impliedly promised to remedy grievances but actually remedied them when on July 20 he informed employees that Respondent terminated Ventura and Farez in response to their complaints, apologized, and took responsibility for not doing so sooner. *ALJD 7:21-25,10:1-4; R. Exh. 12*

The ALJ's decision to discredit Respondent's contention that its actions after the Union campaign began were consistent with its pre-campaign practice is on solid footing. Before the Union campaign Respondent held frequent early morning meetings hosted by manager Luis Betancourt and Kennedy where mere production issues, safety issues, issues regarding machinery and what employees needed to do the job were discussed. *Tr. 615-617.*[2] The ALJ correctly credited employee witnesses Ulloa's and Estelus's testimony in establishing that Respondent materially changed is practice of soliciting and remedying grievances after the Union showed up. Estelus testified that before the Union activity started manager Steve held quick meetings with all employees in the cafeteria in the morning to see if some machines are working but that it was not until after employees' union activity became known that Kennedy participated in the early morning meetings with employees. *Tr. 313-314, 327.* Uloa testified that after the Union arrived Respondent conducted meetings with employees in the morning but that

[2] Even though he declined to credit them in some areas, the Board should affirm the ALJ's determination that Ulloa's and Estelus's testimony is probative as to Berstein's and Kennedy's credibility. *Fn. 7;* see *Daikichi Sushi,* 335 NLRB 622, 622 (2001) ("nothing is more common in all kinds of judicial decisions than to believe some and not all of a witnesses' testimony")

after the Union arrived the meetings were not like the meetings before the Union arrived. *ALJD 10:19-21 Tr. 314, 327.* Estelus's and Uloa's testimony, fully supported by the record documentary evidence, properly grounds the ALJ's rejection of Respondents contention that it did not change is pre-union campaign practice of soliciting grievances after the Union campaign began. *ALJD fn.7; GC Exh 9 and 10; R. Exh. 11.*

In regard to Berstein's meetings, it is also uncontested that before the Union began organizing Respondent held infrequent small group meetings in Respondent's conference room hosted by HR business manager Caitlin Payne. *GC Exh 9, 10.* It was at these meetings that Respondent solicited employee grievances. *Id.* Also, before the Union, owner Berstein held monthly meetings with employees where he attempted to show employees that he is a "human being", "how important values are to [him] and "to talk a little bit about what's going right in the business [and] what's going wrong". *Tr. 252-253, 314, 326, 357, 670-671.* The record does not, however, contain any evidence that Respondent remedied any grievances employees brought to Payne's or Berstein's attention before the Union campaign started.

In terms of his credibility findings, the ALJ noted that not only did Respondent have every opportunity to call employee witnesses to corroborate Berstein's and Kennedy's assertions regarding its pre-campaign meetings but failed to question the General Counsel's witnesses about its pre-campaign meetings. *ALJD fn. 7; E-Z Mills, Inc.*, 101 NLRB 979, 987 (1952) (crediting employee testimony in the face of employer official's contrary testimony because even "though the speeches were given on all floors and to some 700-odd employees, Respondent did not call a single employee witness"), see also *Escondido Ready-Mix Concrete, Inc.*, 189 NLRB 442, 445 (1971) (the Board agreed with an ALJ's determination that respondent's failure to call employee witnesses to testify with respect to allegations was important to resolve contradictory

testimony even though "General Counsel's witnesses [were] not wholly consistent and in some respects contained contradictions".)

The Board should affirm the ALJ's findings and the credibility determinations on which he relied to find that that Respondent materially altered its pre-union campaign methods of soliciting and remedying employee's grievances. The ALJ's reliance on documents created by Respondent in making his credibility determinations is reasonable. *Tramont Manufacturing, LLC.,* 365 NLRB No. 59, fn4 (2017) ("Most of the facts within this decision are based upon undisputed documentary evidence."). The Board should also support the ALJ's finding because there is no credible evidence in the record to support Respondent's contention that its post organizing campaign practices were consistent with its pre-organizing practices. *ALJD 11:3-4.* Consequently, the Board should support the ALJ's finding that Respondent's post-campaign practices materially deviated from its pre-campaign practices and therefore, Respondent violated Section 8(a)(1) of the Act. *ALJD 9:39-41; 10:3-4; 11-18-19.*

### C. The record evidence supports ALJ Amchan's finding that Respondent's Employee Handbook rule prohibiting employees from discussing wages violates Section 8(a)(1) of the Act. (Respondent's exceptions 4 and 5).

The Board should reject Respondent's argument that its rule broadly prohibiting employees from discussing payroll information does not violate Section 8(a)(1) of the Act merely because the employees that testified at the hearing did not receive the handbook that enunciates the rule. In disposing Respondent's contention, the ALJ correctly found that the mere maintenance of the rule prohibiting employees from discussing their wages is unlawful. *ALJD 3:17-19. Independent Stations Co.,* 284 NLRB 394, 397 (1987) ("the mere existence of the rule inhibiting protected conducted, even if not enforced, constitutes an unlawful "interference" in violation of Section 8(a)(1) of the Act"). Respondent, by merely maintaining a rule prohibiting

employees from discussing wages, clearly violated rights bestowed to employees by Section 7 of the Act. *Double Eagle Hotel & Casino,* 341 NLRB 112, 115 fn. 14 (2004).

On its face, Respondent's employee handbook's provision making the "Discussion of payroll information" a "serious offense [which] can result in immediate termination" violates the most basic tenets of the Act. *GC Exh. 4.* Regarding this allegation, the General Counsel's witnesses all testified regarding this allegation that when Respondent's managers spoke to them about their wages the managers told them to keep their wages a secret. *Tr. 167, 198, 224, 249, 297-298, 308, 344.* The Board, therefore, should affirm the ALJ's finding that Respondent's rule unlawfully restrains its employees in the excessive of their basic rights under the Act.

Even assuming, arguendo, that the Board accepts Respondent's argument that its handbook does not violate the Act because it was not distributed to the employees that testified at the hearing, the record is replete with evidence establishing that Respondent verbally promulgated its rule prohibiting employees from discussing their wages. *Tr. 167, 198, 224, 249, 287, 291, 298, 307, 308, 344, 357, 359.* Further, Respondent presented the ALJ with no evidence, and does not argue, that its employee handbook was not distributed to any employees at its Clifton, NJ location or to employees at any of the other locations identified on the face of the handbook. In these terms, the *Aladdin Gaming* Board agreed with an ALJ's finding that even though there was no record evidence that a respondent's employees had access to a printed rule limiting off-duty access to its property, and that only by management had access to the manual containing the prohibition, a manager's verbal communication of the rule is sufficient to establish that the rule was promulgated to employees. *Aladdin Gaming, LLC,* 345 NLRB 585, 620 (2005). (limiting the amount of time Portillo could spend in the EDR both before and after his shift was unlawful). Similarly, here, in January, 2016 Respondent's managers verbally

promulgated the unlawful policy by telling employees that they were receiving wage increases, that not all the increases were identical, and that they should not speak to their co-workers about their wages. *Tr. 167, 224, 249.* The implication here is clear, Respondent's managers were aware of the unlawful rule in the employee handbook and applied it by instructing employees to refrain from discussing their pay with each other.

Either way you slice it, the ALJ was correct in finding that Respondent's maintenance of the rule prohibiting employees from discussing payroll information violates Section 8(a)(1). The Board should not find that the mere fact that the seven employees who testified did not see the written version of the handbook provision obviates Respondent of its legal obligations to not interfere with employees' basic right to discuss their wages with each other. The Board should support the ALJ's conclusion that Respondent, by maintaining a rule threatening employees with "immediate suspension or termination" for discuss[ing] payroll information violated Section 8(a)(1) of the Act.

**D. The record evidence supports ALJ Amchan's finding that Respondent violated Section 8(a)(1) of the Act by increasing the frequency and quality of food it provided to employees after the Union organizing campaign began in order to discourage employees support for the Union. (Respondent exceptions 3, 11, 12 and 13).**

Here, the ALJ again relied upon the record documentary evidence to conclude that Respondent significantly altered the manner and method of providing food to its employees in response to the Union organizing campaign. *ALJD 9:10-15.* Respondent's argument that the ALJ failed to rely on employee witness testimony to support his conclusion misses the mark in a manner similar to its argument that it did not materially change the manner in which it solicited and remedied employee grievances.

The ALJ, once again, relied on the documentary record to conclude that Respondent had not been conducting its "Lunch with the Boss" program in the months before the Union campaign began but reinstituted the program once the Union showed up. *ALJD 8:45-47; Tr. 511-12, 528-29; GC Exh 9, 10.* The ALJ properly considered the uncontested fact that after the Union began organizing its employees, Respondent, for the first time, took employees out to lunch or gave them menus with instructions to order anything they wanted to eat inside the facility. *Tr. 100,117-118, 165, 207-208, 244, 344,* Respondent's contention that permitting employees to order whatever food they liked for "lunch with the boss" was in keeping with its past practice was not credited by the ALJ in the face of credited employee witness testimony that before the Union campaign began Respondent had never done so. *ALJD 9:4-8, Tr. 100-101, 117-118, 165, 207-208, 244, 344.*

Here, as well as in regard to the other ALJ's credibility determinations, the Board should affirm the ALJ's findings in that Respondent significantly altered its pre-union campaign practice of providing food to its employees. The ALJ, again relying on documents created by Respondent, in addition to the employee witness testimony regarding Respondent taking employees out to lunch and giving them menus with instructions to order whatever they liked, correctly held that Respondent's post-campaign practice of providing food to employees violated Section 8(a)(1) and (3) of the Act. *ALJD 9:10-15.*

## IV. CONCLUSION

The entire record, a preponderance of the credible evidence, and the applicable case law provide that Respondent violated Section 8(a)(1) and (3) of the Act as found by ALJ Amchan. Counsel for the General Counsel respectfully requests that the Board issue a remedial order as set forth in the Administrative Law Judge's decision and as prayed for in General Counsel's Exceptions to the ALJD, and require Responded to cease and desist from engaging in the unlawful conduct alleged herein and to comply with any other remedies deemed appropriate.

Dated at Newark, New Jersey, the 18th day of September, 2017.

Respectfully submitted,

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## CERTIFICATION OF SERVICE

This is to certify that copies of the foregoing General Counsel's Answering Brief in response to Respondent's Exceptions to Administrative Law Judge Arthur Amchan's Decision have been serviced upon the parties as follows:

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Dated this 18th Day of September, 2017 in Newark, New Jersey

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